



# **THE ATTORNEY GENERAL OF TEXAS**

**AUSTIN 11, TEXAS**

Grover Sellers  
**WILLIAMSON**  
**ATTORNEY GENERAL**

Honorable Arthur B. Knickerbocker  
The Adjutant General  
Austin, Texas

Dear Sir:

Opinion No. 0-6890  
Re: Authority of the Governor  
to grant deficiency ap-  
propriation for the pur-  
pose of paying instruct-  
ors of the Texas State  
Guard.

Your request for opinion, which has been considered most  
carefully by this department, reads as follows:

"The Texas State Guard has been in operation since the passage of the Texas Defense Guard Act on February 10, 1941. During this time, each unit of the Texas State Guard has conducted weekly periods of training. These training periods consisted of class room, drill field, and field maneuver training, and necessitated considerable expense to each unit. This expense amounted to approximately \$225,000 per year. This cost was borne by funds contributed to the units by the local, city and county governments, and by individual contributions by the members themselves, the Legislature of the State of Texas having appropriated only \$9,000 per year for this purpose. Since the cessation of War, local contributions to each unit have been reduced to such an extent that it is impossible for many of these units to continue.

"The fund made available to the Adjutant General's Department by the Legislature of the State of Texas for the conduction of schools and training for the Texas State Guard is Appropriation H-7 of the Adjutant General's Department, or Item No. 74, referred to on page 26, Supplement to Daily and Permanent House Journal, 49th Legislature, Regular Session, dated June 1945, and which reads as follows:

"For transportation, shelter, subsistence, training supplies and training aids and equipment, including training literature and all other expenses in organizing and maintaining schools, including extension courses and camps of instruction for enlisted men and officers, either or both.  
\$9,000."

"The funds provided for in the above mentioned appropriation being insufficient to carry on the proper training necessary to maintain an adequate internal security force in the State of Texas, the Governor has consented to the diversion of \$50,000 of his Deficiency Allowance to the Adjutant General's Department for the financing of this training.

"Each company and detachment of the Texas State Guard has conducted, in the past, an average of three schools per month. These schools came under three different classifications: schools for officers, schools for non-commissioned officers, and schools for enlisted personnel in general. Due to the reduction of contributions by local agencies to the State Guard, and in order to enable each unit to continue these schools, it will be necessary for the State of Texas to pay a nominal sum to the instructors conducting these schools, from funds derived from state sources.

"The \$50,000 deficiency that would be granted by the Governor to supplement Item No. H-7 of The Adjutant General's Department Appropriation, would not be sufficient to adequately cover this expense. However, it will supplement the small amount of funds that the units will be able to obtain from local sources, and will allow these schools to continue un-interrupted.

"We wish to submit, for your opinion, the question as to whether or not this Department may make such payments to the individual instructors of each unit, from the remaining funds in Appropriation No. H-7 of the Adjutant General's Department, until these funds are exhausted, and thereafter, make such payments from the deficiency supplement approved for that purpose."

Article III, Section 49, of the Constitution of Texas provides:

"No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repeal invasion, suppress insurrection, defend the State in war, or pay existing debts; and the debt created to supply deficiencies in the general revenue shall never exceed in the aggregate at any one time two hundred thousand dollars."

Articles 4351 and 4351a, Revised Civil Statutes, were passed pursuant to such constitutional provision, and read as follows:

"All heads of departments, managers of State institutions or other persons intrusted with the power or duty of contracting for supplies, or in any manner pledging the credit of the State for any deficiency that may arise under their management or control, shall, at least thirty days before such deficiency shall occur, make out a sworn estimate of the amount necessary to cover such deficiency until the meeting of the next Legislature. Such estimate shall be immediately filed with the Governor, who shall thereupon carefully examine the same and approve or disapprove the same in whole or in part. When such deficiency claim, or any part thereof, has been so approved by the Governor he shall indorse his approval thereon, designating the amount and items thereof approved and the items disapproved, and file same with the Comptroller; and the same shall be authority for the Comptroller to draw his deficiency warrant for so much thereof as may be approved; but no claim, or any part thereof, shall be allowed or warrants drawn therefor by the Comptroller, or paid by the Treasurer, unless such estimate has been so approved and filed. If there is a deficiency appropriation sufficient to meet such claims, then a warrant shall be drawn therefor and the same shall be paid; but, if there is no such appropriation, or if such appropriation be so exhausted that it is not sufficient to pay such deficiency claim, then a deficiency warrant shall issue therefor; and such claim shall remain unpaid until provision be made therefor at some session of the Legislature thereafter. The provisions of this article shall not apply to fees

and dues for which the State may be liable under the general laws. When any injury or damage shall occur to any public property from flood, storm or any unavoidable cause, the estimate may be filed at once but must be approved by the Governor as provided in this article."

"It shall be lawful for the Governor to approve deficiency warrants as provided for in Article 4351, Revised Civil Statutes, 1925, to any amount, the aggregate of which does not exceed Two Hundred Thousand (\$200,000.00) Dollars, for all purposes for which he is permitted to approve such deficiency warrants. If any deficiency warrants are approved above this amount, such warrants are invalid and unredeemable by the State Treasurer."

It appears that some doubt as to the constitutionality of Article 4351 was cast by Judge Hawkins in his concurring opinion in *Terrell v. Middleton*, 108 Tex. 14, 191 S. W. 1138. However, we believe that its validity has been clearly established as pointed out in Opinion No. 0-2118, by the consistent administrative practice for over thirty years under the views of the majority of the Supreme Court that decided the *Middleton* case, as well as the implied sanction given the statute by the Court in *Fort Worth Cavalry Club, Inc., v. Sheppard*, 135 Tex. 339, 83 S. W. (2d) 660.

"Casual deficiency" in this connection was defined in said Opinion No. 0-2118 as an unforeseen and unexpected situation which develops unexpectedly and requires the immediate attention at a time when the Legislature, the usual authority, is unable to act.

There can be no casual deficiency of revenues, such as we are considering here, except with respect to those purposes for which the Legislature has made a specific appropriation. It is unquestioned that the Legislature did not intend to confer upon the Governor authority to approve the issuance of deficiency warrants to finance some operation which it had considered, or might have considered, during its session, and failed or refused to appropriate money for. This point is aptly illustrated by the Court of Civil Appeals in the *Middleton* case, 187 S.W. 367, 372 (writ of error refused), where it said:

"The appropriation by the Legislature to pay for the articles, used by the Governor was made under the guise of covering a deficiency, and appellant actually contends that Article 3 section 49 of the Constitution, and article 4342, Revised Statutes (now Article 4351), authorize the

Legislature to make provision for the payment of debts contracted by the Governor for provisions and other things purchased by him between Legislatures. We understand that the rule is that a state constitution should be liberally construed, in contradistinction to a strict construction of the federal Constitution; but it is liberality of construction running riot when items purchased for the table, automobile, horses, and library of the Governor can be ranked as "casual deficiencies of revenue", or 'to repel invasion, suppress insurrection, defend the State in time of war or pay existing debts.' None of these contingencies had arisen, and, in regard to the last named, the state had contracted no debt, and it was not in existence. There were no casual deficiencies of revenue to pay for luxuries and necessities for the household of the Governor, because no attempt had been made to raise revenue for that purpose. No provision had been made for it....."

The following formula was stated in Opinion No. 0-2118 to govern the issuance of deficiency warrants:

"Where the Legislature has made a specific appropriation for a purpose and thereafter there arises a casual deficiency in the revenues thus appropriated, the Governor, upon proper application therefor by one clothed with the power to incur such indebtedness on behalf of the State, may approve a claim for a deficiency warrant to extend to the next session of the Legislature or to the beginning of the next fiscal year."

A careful reading of Item No. 74 of the appropriation for the Adjutant General's Department reveals that the payment to an instructor is within its scope. There can be no question that such payment is included with the phrase, "all other expenses in organizing and maintaining schools."

It cannot be questioned that the deficiency in this appropriation was unforeseen and unexpected. At the time the Legislature was in session, it could not have been foreseen that hostilities would terminate so soon thereafter, nor could it be anticipated that the various city and county governments would cease their contributions to the units of the Texas State Guard at this time.

Article 4351, in defining the officers or agents of the State who

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are authorized to create debts on behalf of the State, refers to "all heads of departments, managers of State insitutions or other persons intrusted with the power or duty of contracting for supplies, or in any manner pledging the credit of the State for any deficiency that may arise under their management or control." The Adjutant General is such an officer. Article 5787.

Therefore, it is the opinion of this Department that the Adjutant General may make payments to the individual instructors of each unit from the balance remaining in Item No. 74 (referred to by you as Appropriation No. H-7). It is the further opinion of this department that the Governor, upon proper and timely filing of an estimate as provided in Article 4351, may approve a claim for a deficiency warrant to extend to the meeting of the next Legislature.

Very truly yours,

ATTORNEY GENERAL OF TEXAS

By

Arthur L. Moller  
Assistant

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